Supreme Court, U.S.
FILED
07-443 MAY 14 2007
OFFICE OF THE CLERK

68

No. (1)

In the Supreme Court of the United States

LEONARD W. KROUNER,
Petitioner,

v.

UNITED STATES TAX COURT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI (REDACTED)

LEONARD W. KROUNER
Petitioner pro se

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QUESTIONS PRESENTED

I.

Does a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding meet minimum standards for procedural and substantive due process and satisfy the requirements in this Court's decisions where:

(1) the state court "automatically disbarred" the attorney without notice or opportunity to be heard based upon a criminal conviction by plea;

(2) the federal attorney disciplinary proceeding in the Tax Court was commenced by order to show cause which did not specify particular charges;

(3) the Tax Court prevented petitioner from introducing [redacted] and [redacted] testimony by telephone at the hearing it conducted although the Tax Court was equipped with courtrooms capable of receiving testimony by telephone;

(4) the Tax Court " hearing " was an oral argument which lasted less than one hour at which no evidence was allowed other than the petitioner's statement;

(5) neither the Tax Court nor the D. C. Circuit **found** " ... the facts of [the petitioner's] conduct and whether the conduct had been so grievous [when compared to similar conduct in other attorney discipline cases] as to require disbarment.";

(6) the Tax Court **could not** "... view [the attorney's] conviction in the context of any mitigating circumstances" because the Tax Court prevented the petitioner from

introducing [redacted] expert and [redacted] testimony by telephone, and the Tax Court Rules **did not** specify criteria for sanction such as the mitigators and aggravators set forth in the ***American Bar Association Standards for Determining Lawyer Discipline ("ABA Standards")***, App. A, 23a - 34a;

(7) neither the Tax Court nor the D.C. Circuit evaluated "... the conclusions to be drawn from the facts established by the evidence" , or made an "independent inquiry" into the [redacted] and other factors mitigating punishment ; and

(8) the Tax Court made "bare statements" unsupported by findings of real conduct based upon evidence when adding disbarment to the multiple criminal punishments the attorney suffered?

II.

Are notice of charges, an opportunity to present testimony, findings of fact based upon evidence, and conclusions of law essential in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding where disbarment was automatic?

III.

Should the attorney discipline decisions of this Court be followed, and the **ABA Standards** for determining sanction be adopted in federal attorney discipline proceedings following a state attorney discipline proceeding to resolve the split between the D.C. Circuit and the Ninth Circuit?

RULE 14.1(b) STATEMENT

The parties to this proceeding in the United States Circuit Court for the District of Columbia Circuit are:

Petitioner: Leonard W. Krouner.

Respondent: United States Tax Court

TABLE OF CONTENTS

Question Presented i

Rule 14.1(b) Statement iii

Table of Contents iv

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 5

Conclusion 14

Appendix 1a

TABLE OF AUTHORITIES

Cases

Arnett v. Kennedy,
416 U.S. 134 (1974) 12

Beard v. Star,
370 U.S. 41(1962) 10

Discipline of McClendon,
120 Wn..761, 845 P.2d 1066 (Wn. 1993) 11

Ex Parte Garland,
4 Wall. 333 8

Fuentes v. Shevin,
407 U.S. 67 (1972) 9

In re Cappell,
866 A. 2d 784 (D.C. 2004) 10

In re Gault,
387 U.S. 1 8

In re Grievance Comm. Of the United States Dist. Court,
847 F.2d 57, 61(2d Cir. 1988) 5

In re Ruffalo,
390 U.S. 544 (1961) 8, 11

In re Sharp,
674 A.2d 899 (D.C. 1996) 10

In re Weiss, 819 A2d 670 (D.C. 2003) 11

Selling v. Radford,
243 U.S. 46 (1917) 8, 11, 14

Spevack v. Klein,
385 U.S. 511 8

Standing Comm. On Discipline of the United States Dist. Ct. for the Central Dist. Of California v. Yagman,
856 F. Supp. 1395, 1396 (C.D. Cal. 1994), *reversed on other grounds*, 55 F.3d 1430 (9th Cir. 1995) . . . 6

Theard v. *United States*,
354 U.S. 278 (1957) 6, 8, 10

Constitution, Statutes and Rules

U.S. Const. amend. V 2
U.S. Const. amend. VI 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2101(c) 1
Supreme Court Rule 10(a) 5
Supreme Court Rule 10(c) 5
Supreme Court Rule 13.1(3) 1
Supreme Court Rule 13.1(5) 1

PETITION FOR A WRIT OF CERTIORARI

Leonard W. Krouner ("Petitioner") respectfully petitions for a writ of certiorari to review what on information and belief is the unreported amended memorandum opinion and judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Upon information and belief the amended memorandum opinion of the U.S. Court of Appeals for the District of Columbia Circuit filed February 27, 2007 is unreported, and is reproduced at App. A, 8a - 12a.

Upon information and belief the memorandum sur order of the U.S. Tax Court dated October 22, 2004 is unreported, and is reproduced at App. A, 14a - 18a.

JURISDICTION

The order of the U.S. Court of Appeals for the District of Columbia Circuit sought to be reviewed was filed on February 27, 2007. This petition is timely under 28 U.S.C. § 2101(c), and Supreme Court Rule 13.1(3) and (5) because it is being filed pursuant to an extension of time to May 14, 2007 granted by The Chief Justice on March 19,2007 as indicated in a letter dated March 19,2007 from Case Analyst Gail Johnson reproduced at App. A, 1a - 2a. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are the United States Constitution Fifth and Sixth Amendments. The relevant statutory provisions are reproduced at App. A, 21a - 22a.

STATEMENT OF THE CASE

This federal attorney disciplinary proceeding arises from petitioner's filing for and receipt of private disability insurance benefits from October 2000 to October 2001 ("benefits period").

During the benefits period petitioner suffered symptoms which caused petitioner's treating orthopedic and physical medicine and rehabilitation physicians to certify that petitioner was unable to perform the usual and customary duties of his occupation.

Petitioner provided releases during the benefits period authorizing insurer access to petitioner's medical and financial records, and insurer communication with petitioner's treating physicians. Petitioner provided insurers with monthly detailed expense statements from his professional practice. Petitioner accounted for all professional income received during the disability benefits period, and released professional income records to insurers .

During the benefits period petitioner suffered from untreated [redacted]. A [redacted] of petitioner's [redacted] is loss of confidence in ability to perform daily functions. Petitioner incorrectly reported inability to function professionally to insurers during the benefits period. Petitioner's incorrect reporting of professional functioning

during the benefits period resulted from judgment impaired by [redacted]. Upon recognizing that disability benefits were obtained by incorrect reporting of ability to function, petitioner offered to refund the benefits received. Petitioner's refund offer would only be accepted in the context of a criminal proceeding. Petitioner made full restitution of the disability benefits he received on May 12, 2003.

Proof of petitioner's [redacted] and its affect on petitioner's ability to assess and report on professional functioning consists of reports and/or testimony of an evaluating [redacted] in Albany, NY, and a treating [redacted] in La Jolla, Ca. The Tax Court order dated August 30,2004 which denied petitioner's motion to allow telephone testimony by [redacted] witnesses at the September 14, 2004 hearing in Washington D.C. prevented the Tax Court, the D.C. Circuit, and this Court from considering and evaluating medical evidence essential to determine sanction in this federal attorney discipline proceeding.

Petitioner's evaluating [redacted] testified by telephone from Albany, NY in petitioner's Florida attorney disciplinary proceeding. Contrary to the Florida Referee in petitioner's Florida disciplinary proceeding, the Tax Court concluded petitioner's evaluating [redacted] Florida testimony was insufficient to mitigate intent without any discussion (Tax Court Memorandum Sur Order dated October 22, 2004, App.,18a.). The Tax Court precluded questioning petitioner's evaluating [redacted] by not allowing him to testify by telephone although the Tax Court has courtrooms in Washington D.C. equipped to receive telephone testimony.

No evidence contradicted petitioner's evaluating [redacted] testimony that petitioner's reports of inability to

work during the benefits period contrary to the financial records petitioner released to insurers resulted from [redacted]. The Tax Court's finding that petitioner's medical evidence was insufficient to mitigate the effect of petitioner's guilty plea has no evidentiary support.

The D.C. Circuit Amended Memorandum Opinion affirming petitioner's disbarment by the Tax Court correctly found petitioner "... was, apparently without being given an independent hearing, 'automatically disbarred'" from the practice of law in New York [based upon petitioner's guilty plea in New York to insurance fraud, grand larceny, and workers compensation fraudulent practice felonies all arising from petitioner's receipt of disability benefits in 2000 /2001.] App. A, 8a. The D.C. Circuit Amended Memorandum Opinion at App. A, 11a held the Tax Court made "an independent evaluation of [petitioner's fitness to practice law]" based upon evidence introduced in petitioner's Florida attorney disciplinary proceeding.

The Tax Court's "independent evaluation of [petitioner's fitness to practice]" affirmed in the D.C. Circuit Amended Memorandum Opinion (App. A, 11a) consisted of a "bare statement" that "... the mitigating evidence presented by [petitioner is] unpersuasive and insufficient to mitigate the effects of his guilty plea." The Tax Court's disbarment was based upon "the counts" petitioner pled to which "involved acts of dishonesty that raise questions of integrity and fitness to practice law." App. A, 11a .

The issues in this Petition involve whether the procedure and substance of the legal process followed in the Tax Court and the D C. Circuit's review of the Tax Court decision conflict with "relevant decisions of this Court", and conflict

with "the decision of another United States court of appeals on the same important matter," under Supreme Court Rule 10(a) and (c).

The issues in this Petition also involve important national questions concerning whether uniform due process procedures and criteria for determining sanction in federal attorney discipline proceedings following state attorney disciplinary proceedings should be adopted.

REASONS FOR GRANTING THE PETITION

The elements of due process in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding have never been articulated by this Court.

Not identifying elements of due process in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding results in a process in federal courts such as the U.S. Tax Court which does not provide the accused or the public with sufficient notice of the charges upon which the proceeding is based, the procedures followed prior to and at the hearing to determine sanction, or the criteria to determine sanction.

Differences between the Second Circuit and D.C. Circuit procedure in attorney disciplinary cases are apparent from comparing the District Court and Second Circuit decision in *In Re Grievance Comm. Of the United States Dist. Court,* 847 F.2d 57, 61(2d Cir. 1988) with the Tax Court and D.C. Circuit decision in this case found at App. A, 8a - 12a, and 14a - 18a. The District Court and Second Circuit afford the accused attorney notice of specific charges, and opportunity to present evidence, and *de novo* appellate review of the District Court findings of fact and conclusions. The Tax

Court and D.C. Circuit in this case did not provide notice of specific charges, the procedure prior to or at hearing, the criteria to be applied in determining sanction, findings of fact based upon record evidence, did not allow essential [redacted] testimony by telephone, did not make any findings concerning the actual conduct, or afford de novo appellate review of the Tax Court's findings and legal conclusions.

Differences between the criteria applied in determining sanction in federal attorney discipline cases following state attorney discipline cases are apparent by comparing the Ninth Circuit holding in *Standing Comm. On Discipline of the United States Dist. Ct. for the Central Dist. Of California v. Yagman* , 856 F. Supp. 1395, 1396 (C.D. Cal. 1994), reversed on other grounds, 55 F.3d 1430 (9th Cir. 1995) with the D.C. Circuit holding in this case found in App. A, 8a - 12a. In *Yagman , supra* the Ninth Circuit held that the District Court's not applying the ***ABA Standards, App. A, 23a - 34a,*** for determining sanction in an a federal attorney discipline case was an abuse of discretion constituting reversible error. In this case the D.C. Circuit, over petitioner's objection, did not mention the Tax Court's refusal to apply the ***ABA Standards*** in determining petitioner's sanction.

Different procedures and different criteria in federal attorney discipline cases following state attorney discipline cases are likely to result in different sanctions for similar misconduct. In *Theard* v. *United States*, 354 U.S. 278 (1957) an attorney's forgery which resulted in monetary gain was excused by mental illness. In this case the D. C . Circuit accepted the Tax Court's unsupported and unexplained conclusion that the [redacted] evidence was insufficient to mitigate intent. Petitioner's objection to this conclusion is that nothing in the record supports rejecting the finding that

petitioner's reporting no income to his insurers contrary to the financial records petitioner released to insurers was the [redacted] of judgment impaired by [redacted]. The D.C. Circuit Amended Memorandum Opinion said "Although certain conditions may be sufficiently mitigating to overcome presumptive effect that a federal court must accord a state court disbarment under *Selling*, 243 U.S. at 50 - 51; see *Theard*, 354 U.S. at 292, [petitioner] fails to show that he was denied procedural due process. App. A, 11a.

The D.C. Circuit decision is troublesome for several reasons. First, it makes no effort to explain which "certain conditions" are sufficiently mitigating to overcome the presumptive effect of a guilty plea, and why petitioner's [redacted] bearing directly on his ability to correctly assess and report his level of professional functioning is insufficient to establish the real absence of dishonest intent. Second, it overlooks the Tax Court's unexplained, arbitrary denial of petitioner's request to have [redacted] witnesses testify by telephone to answer any questions the Tax Court had concerning the relationship between petitioner's [redacted] and intent during the benefits period. Third, it ignores petitioner's substantive due process objection to the Tax Court's finding [redacted] evidence insufficient to mitigate intent in the absence of contrary evidence, and erroneously finds that petitioner failed to show he was denied procedural due process.

Due process deficiencies in the Tax Court in this case include lack of adequate notice of specific charges prior to hearing, lack of notice of the pre hearing and hearing procedures, lack of notice of the criteria to be applied in determining sanction, preventing introduction of essential [redacted] evidence by telephone, making findings contrary to unchallenged evidence, and failing to make findings of fact

supported by record evidence. This case provides an opportunity to articulate minimum procedural and substantive due process requirements in federal attorney discipline proceedings following state attorney discipline proceedings.

I.
THE TAX COURT AND D. C. CIRCUIT PROCEEDINGS IN THIS CASE CONFLICT WITH THE DECISIONS OF THIS COURT

A. Procedural and Substantive Due Process Insufficiency of Charging Document and Tax Court Attorney Discipline Rules

Property and reputation interests in maintenance of a law license cannot be impaired or revoked without due process under *Selling v. Radford,* 243 U.S. 46 (1917) followed in *Theard v. United States*, 354 U.S. 278 (1957).

Attorney discipline proceedings "... are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault,* 387 U.S. 1, 33. The charge must be known before the proceedings commence." *In re Ruffalo,* 390 U.S. 544, 551 (1961).

Disbarment is a penalty which cannot be imposed without due process. *In re Ruffalo,* 390 U.S. 544 at 550 (1968) relying upon *Ex Parte Garland,* 4 Wall. 333, 380 and *Spevack v. Klein,* 385 U.S. 511, 515.

> "... [T]he central meaning of procedural due process has been clear: 'Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. *Baldwin v. Hale,* 1 Wall 223, 233. *See Windsor v. McVeigh,* 93 U.S.

> 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted in a meaningful time and in a meaningful manner."
> Armstrong v. Manzo, 380 U.S. 534, 552.

Fuentes v. Shevin, *407* U.S. 67, 80 (1972).

Neither the Tax Court order to show cause dated July 16, 2004 initiating this proceeding (App. A, 19a - 20a), nor the Tax Court Rules notified respondent of specific charges, the procedure, or the criteria to be applied in determining sanction. Lack of notice of specific charges, the procedure to be followed prior to or at the hearing, or the criteria to be applied in determining sanction are fundamental procedural and substantive due process deficiencies.

B. Procedural and Substantive Due Process Insufficiency of Not Allowing Introduction of Essential [redacted] Testimony By Telephone

As a practical matter petitioner was unable to produce [redacted] witnesses located in Albany, NY and La Jolla, CA at the Tax Court hearing in Washington D.C. Petitioner's pre hearing motion that his [redacted] witnesses be allowed to testify by telephone is consistent with the Tax Court's representation that its courtrooms can receive testimony via telephone or other media from locations outside the courtrooms.

Petitioner's [redacted] witnesses were essential to establish that non disclosure of income from law practice during the benefits period was a symptom of illness rather than a dishonest act.

The Tax Court order dated August 30, 2004 denying petitioner's motion to produce essential [redacted] testimony by telephone denied petitioner the ability to produce [redacted] evidence essential to the determination of sanction.

Production of favorable testimonial evidence is as important to due process as the confrontation of adverse witnesses recognized in *Beard v. Star,* 370 U.S. 41, 43 (1962).

The Tax Court's unexplained denial of petitioner's motion to produce essential [redacted] testimony by telephone is another procedural and substantive due process deficiency in the Tax Court procedure to determine disbarment.

C. Tax Court and D. C. Circuit Not Determining the Facts of Petitioner's Misconduct or Whether the Misconduct Was So Grievous as to Require Disbarment

The primary purpose of attorney discipline is determine whether the attorney's practicing law is a danger to the public. *See e.g., In re Sharp*, 674 A.2d 899, 900 (D.C. 1996) holding "'[t] he traditional view of Anglo- American jurisprudence [is] that disbarment is intended not as punishment, but as protection to the public'") (internal citation omitted).

Where illness rather than dishonest motive is the real cause of criminal misconduct this Court has held disbarment is a gross injustice. *See e.g., Theard v. United States* , 354 U.S. 278 (1957) where disbarment for forgery as a result of illness was not allowed as a :"gross injustice." State courts also hold that criminal misconduct victimizing clients, other attorneys, and the public where full restitution was not made

- generally considered more serious than receiving and returning disability insurance benefits under an [redacted] induced misconception of inability to function - can be mitigated by proof that [redacted] was the real cause. *See e.g., In re Cappell,* 866 A. 2d 784 (D.C. 2004) where disbarment was stayed and a three year suspension imposed on an attorney who stole client funds while in a major depression, *In re* Weiss,839 A2d 670 (D.C. 2003) where a mentally ill attorney was suspended for three years for stealing law firm funds 54 times totalling $676,465.79, and *Discipline of McClendon,* 120 Wn..761, 845 P.2d 1066 (Wn. 1993) where a mentally ill attorney who pled guilty to felony theft of client funds, failed to repay $1,127, 853 in borrowed client funds, committed 11 other ethical violations, and was on criminal probation received a two year retroactive suspension.

"Bare statements" the evidence was insufficient to mitigate the effects of a guilty plea , such as that made by the Tax Court in this case, App. A, 18a, are legally insufficient to support disbarment under *Selling v. Radford,* 243 U.S. 46, 51 (1917).

The D.C. Circuit did not determine "... the facts of [petitioner's] conduct and whether the conduct had been so grievous as to require disbarment." in accordance with *In re Ruffalo,* 390 U.S. 554, 552 (1968). Instead of following *Ruffalo, id.*, the D.C. Circuit unacceptably rationalized the Tax Court's refusal to determine the real basis for petitioner's misconduct, and then refused to determine the seriousness of petitioner's misconduct when compared to illness induced conduct in other attorney discipline cases. The D.C. Circuit's refusal to follow *Ruffalo, id.*, is evident from its statement that considering attorney discipline cases offered to demonstrate that petitioner's conduct is not serious enough to

warrant disbarment would be to "second guess" the Tax Court. App. A, 12a.

II

NOTICE OF CHARGES, AN OPPORTUNITY TO PRESENT TESTIMONY, FINDINGS OF FACT BASED UPON EVIDENCE, AND CONCLUSIONS OF LAW ARE ESSENTIAL IN A FEDERAL ATTORNEY DISCIPLINARY PROCEEDING FOLLOWING A STATE ATTORNEY DISCIPLINARY PROCEEDING WHERE DISBARMENT WAS AUTOMATIC ?

Disciplinary impairment of an attorney's license to practice law effects Constitutionally protected liberty, property, and reputation interests.

The Fifth Amendment requires that government deprivation of such interests must be accompanied by " . . . minimum procedural safeguards, including some form of notice and hearing, the formality and procedural requisites for such a hearing varying, depending upon the importance of the interests involved and the nature of subsequent proceedings." *Arnett v. Kennedy,* 416 U.S. 134 (1974).

An attorney's liberty, property, and reputation interests in his law license are as important as those of a nonprobationary federal employee's liberty and property interest in his job, or the interests of a special education student or his legal representative in receiving an appropriate education, or the interests of numerous other persons who are entitled to notice, hearing, the opportunity to introduce favorable evidence, to confront adverse evidence, and a decision including findings of fact supported by references to record evidence, and conclusions of law supported by references to

legal authority when government action effecting those interests occurs.

The Tax Court and District of Columbia Circuit disbarring petitioner in this proceeding initiated by an order to show cause devoid of specific factual charges, with no defined procedures for discovery, introduction of or challenges to evidence, with no requirement for a legally sufficient decision supported by record evidence and legal authority demonstrates the need for this Court to articulate minimum due process standards in federal attorney discipline matters. That need is especially acute in cases, like this, where state court disbarment occurred with no hearing.

III.
THE DECISIONS OF THIS COURT SHOULD BE FOLLOWED AND THE *ABA Standards* ADOPTED AS THE CRITERIA FOR DETERMINING SANCTION IN FEDERAL ATTORNEY DISCIPLINE CASES FOLLOWING STATE ATTORNEY DISCIPLINE CASES

Variations in sanctions in federal attorney discipline cases under similar circumstances are more likely when individual Circuit Courts decide not to follow the clear holdings of this Court, and make up their own separate procedural rules and findings to rationalize a certain result contrary to unchallenged evidence.

The uncontroverted [redacted] evidence rejected by the Tax Court and the District of Columbia Circuit here is that [redacted] - not dishonest motive - caused inaccurate reporting of income producing activity contrary to income producing documents petitioner released to insurers.

Rejection of facts supported by unchallenged [redacted] evidence is a "gross injustice" equivalent to the "gross injustice" of adding disbarment to multiple criminal penalties the petitioner endured because of [redacted] induced incorrect reporting of income producing activity. The *Selling v. Radford,* supra "gross injustice" exception to federal court adoption of state court automatic disbarment should be applied in this case to prevent Tax Court disbarment.

Rather than encourage federal circuit courts not to apply uniform criteria when determining federal attorney discipline sanction , a preferred approach is for federal courts to apply uniform criteria for determining attorney sanction such as that set forth in the **ABA Standards**, and to follow the holdings of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard W. Krouner,
Petitioner
4196 Mt. Hukee Avenue
San Diego, CA 92117- 4732
(858) 277-5323

July 9, 2007

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 19, 2007

Mr. Leonard W. Krouner
4196 Mt. 14 Hukee Avenue
San Diego, CA 92117

Re: Leonard W. Krouner
v. United States Tax Court
Application No. 06A896

Dear Mr. Krouner:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on March 19, 2007 extended the time to and including May 14, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By

/s/
Gail Johnson
Case Analyst

NOTIFICATION LIST

Mr. Leonard W. Krouner
4196 Mt. 14 Hukee Avenue
San Diego, CA 92117

Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2006

No. 05-1084

[Filed December 15, 2006]

Leonard W. Krouner, Appellant	)
v.	)
U.S. Tax Court, Appellee	)

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph,* Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's amended petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

* Circuit Judge Randolph did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2006

No. 05-1084

[Filed December 15, 2006]

Leonard W. Krouner, Appellant	)
v.	)
U.S. Tax Court, Appellee	)

BEFORE: Henderson, Rogers, and Griffith, Circuit Judges

ORDER

Upon consideration of appellant's amended petition for rehearing filed November 20, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2006

No. 05-1084

[Filed February 27, 2007]

Leonard W. Krouner, Appellant	)
v.	)
U.S. Tax Court, Appellee	)

BEFORE: Henderson, Rogers, and Griffith, Circuit Judges

ORDER

Upon consideration of appellant's motion for "an order to reconsider and redact or seal stigmatizing language in this court's memorandum opinion accompanying the judgment filed on October 13, 2006" and motion "to seal appellant's petition and amended petition for rehearing or rehearing en banc," and the opposition thereto, it is

ORDERED that the motion to reconsider be granted. The Clerk is directed to issue an amended memorandum opinion. It is

FURTHER ORDERED that the motion to seal be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

AMENDED MEMORANDUM OPINION

On February 20, 2003, Krouner pled guilty to three felonies: insurance fraud in the third degree, *see* N.Y. Penal Law § 176.20, grand larceny in the fourth degree, *see id.* § 155.30, and workers' compensation fraudulent practices, *see* N.Y. Workers' Compensation Law § 96. *See In re Krouner*, 305 A.D.2d 932, 932 (N.Y. App. Div. 2003) (per curiam). He was, apparently without being given an independent hearing, "automatically disbarred" from the practice of law in New York on the basis of these convictions. *See id.*

I.

On July 16, 2004, the Tax Court directed Krouner to show cause why he should not be suspended or disbarred from

practice before the Tax Court.[1] After receiving Krouner's written response, a hearing before a three-judge panel was held on September 14, 2004. After the hearing, Krouner was permitted to submit another brief. Krouner argued principally that (1) the Tax Court could not rely on the New York disbarment because the Supreme Court of New York, Appellate Division failed to provide him due process as it did not examine the mitigating circumstances of his various conditions, and (2) those conditions mitigate his crimes such that these convictions should not be grounds for disbarment from Tax Court practice. At the hearing, Krouner gave a somewhat incongruous account of his criminal convictions: He admitted that he pled guilty to crimes that the court described as "involv[ing] willfulness," but he described those offenses as "sort of like [] strict liability crime[s]" because of the interaction of certain "circumstantial evidence charges that are available in New York" and the sections of the N.Y.

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[1] Rule 202 of the Tax Court's rules of practice and procedure, which was amended in September of 2005, *see* http://www.ustaxcourt.gov/notice.htm, provided at the relevant time that:

> The Court may deny admission to its Bar to, or suspend, or disbar, any person who in its judgment does not possess the requisite qualifications to represent others, or who is lacking in character, integrity, or proper professional conduct. Upon the conviction of any practitioner admitted to practice before this Court for a criminal violation of any provision of the Internal Revenue Code or for any crime involving moral turpitude, or where any practitioner has been suspended or disbarred from the practice of his or her profession in any State or the District of Columbia, or any commonwealth, territory, or possession of the United States, the Court may, in the exercise of its discretion, forthwith suspend such practitioner from the Bar of this Court until further order of Court.

Penal Code under which he was charged. Krouner emphasized, however, that "I'm not trying to say [] that I wasn't guilty of the crimes that I pled to" and "I'm not here to say that I'm innocent of those crimes."

On October 22, 2004, the Tax Court issued its decision accompanying the disbarment order. The Tax Court treated Krouner's motion to reopen the record to consider the evidence from Krouner's Florida disciplinary proceedings in 2004 as a motion to vacate, *see* Tax Court Rule 162, and indicated that it would examine the evidence in that light. On January 27, 2005, the Tax Court, "[a]fter due consideration of the Confidential Record," denied Krouner's motions to vacate and for reconsideration.

II.

Krouner challenges the decision of the United States Tax Court to disbar him on the grounds that he was denied due process and that the court failed to credit sufficiently the "mitigating" effect of his evidence and based its disbarment upon the erroneous conclusion that the record demonstrated that he was aware that his guilty pleas to three felonies under New York law would result in disbarment in jurisdictions outside of New York. Whether our review is for abuse of discretion, *see Tulman v. Comm. on Admissions & Grievances,* 135 F.2d 268, 268 (D.C. Cir. 1943) (per curiam); *In re Cordova-Gonzalez*, 996 F.2d 1334, 1335-36 (1st Cir. 1993), or plenary, *see In re Grievance Comm. of the United States Dist. Court,* 847 F.2d 57, 61 (2nd Cir. 1988); *see also* 26 U.S.C. § 7482(a), we hold that Krouner's challenges fail.

First, even assuming that the "automatic" New York disbarment fails the conditions set forth in *Selling v. Radford,* 243 U.S. 46 (1917), and followed in *Theard v. United States,*

354 U.S. 278 (1957), the Tax Court's independent inquiry into Krouner's moral fitness afforded him due process of law. *See In re Ruffalo,* 390 U.S. 544, 551-52 (1968). The Tax Court allowed Krouner to present evidence mitigating the implication that his crimes evidenced an unfitness to practice before the Tax Court *see* Tax Court Rule 202, including allowing the late submission of testimony from the Florida proceeding, and the Tax Court then based its disbarment upon its independent evaluation of Krouner's fitness. Although certain conditions may be sufficiently mitigating to overcome the presumptive effect that a federal court must accord a state disbarment under *Selling,* 243 U.S. at 50-51; *see Theard,* 354 U.S. at 292, Krouner fails to show that he was denied procedural due process. His reliance on *In re Thies,* 662 F.2d 771, 773 & n.15 (D.C. Cir. 1980), where this court vacated a Tax Court order of disbarment predicated "exclusively" upon the state disbarment, is misplaced because the Tax Court's decision was based on an independent assessment of whether the New York proceedings afforded Krouner adequate process. Krouner contends that because the New York Appellate Division did not conduct an independent hearing prior to disbarring him, the Tax Court similarly denied him due process by relying upon the New York disbarment. However, the Tax Court – with the understanding that its actions were governed by *Selling* and *Thies* – inquired into, and allowed Krouner to explain, his guilty pleas. The Tax Court found that "the counts in this case all involved acts of dishonesty that raise questions of integrity and fitness to practice law"; that the criminal proceedings did not indicate any due process defect, and none was claimed by Krouner; and that Krouner admitted that he was guilty of the crimes and these crimes carried an element of "intent." It also examined the mitigating evidence presented by Krouner and "f[ound] [it] unpersuasive and insufficient to mitigate the effects of his guilty plea." Thus, the Tax Court did not repeat the core

defect identified in *Thies,* 662 F.2d at 773, but independently inquired into the nature of the criminal activity and circumstances surrounding the guilty pleas, and thus of Krouner's fitness to practice before the Tax Court. Similarly, by independently inquiring into the mitigating effect of evidence identified by Krouner, the Tax Court provided the remedy that the Supreme Court found appropriate in *Theard*: an independent federal court examination of the grounds for disbarment with the understanding that some conditions may be insufficiently serious to indicate unfitness to practice law. *See Theard,* 354 U.S. at 282-83.

Second, the Tax Court also did not abuse its discretion, or otherwise err so as to require vacatur of this disbarment, in concluding that Krouner was not fit to practice before it. Krouner presents this legal contention in a number of ways, but in the end each fails. For instance, Krouner contends that the Tax Court did not examine the "real conduct" underlying his guilty pleas. He points out that the Tax Court stated that "[c]onduct such as that admitted by Mr. Krouner is a per se violation of the Rules under which practitioners in this Court operate." But the Tax Court's "per se" observation, contrary to Krouner's representations, does not indicate that the Tax Court allowed the fact of his conviction to suffice for his disbarment; rather, it viewed his conviction in the context of any mitigating circumstances and found these circumstances insufficient to avoid disbarment. Although Krouner points to cases where courts have imposed less severe sanctions, this argument simply seeks to have this court second-guess the Tax Court. Additionally, even assuming that the Tax Court erred in attributing to Krouner knowledge that his guilty pleas would result in his disbarment in jurisdictions outside New York, it would not constitute an abuse of discretion unless the Tax Court rested its decision on this fact, which it did not.

APPENDIX E

UNDER SEAL

UNITED STATES TAX COURT
WASHINGTON, DC 20217

In re: Leonard W. Krouner

ORDER OF DISBARMENT

This Court received information that on April 30, 2003, Leonard W. Krouner was disbarred from practice by Order of the Supreme Court of New York, Appellate Division, Third Judicial Department and he was also suspended from practice pending final disposition of the disciplinary proceedings by Order of the District of Columbia Court of Appeals dated May 18, 2004. This Court afforded Leonard W. Krouner the opportunity, on or before August 31, 2004, to respond and to request a hearing to be held on September 14, 2004, why he should not be suspended or disbarred. Upon consideration of Mr. Krouner's submissions and his testimony at the Order to Show Cause hearing on September 14, 2004 and for reasons set forth in the attached Memorandum Sur Order, it is

ORDERED: That the Court's Order to Show Cause is made absolute in that, under the provisions of Rule 202 of the Rules of Practice and Procedure of this Court, Leonard W. Krouner is disbarred forthwith from further practice before the United States Tax Court, and it is

ORDERED: That Leonard W. Krouner be and hereby is prohibited from holding himself out as a member of the Bar of the United States Tax Court, and it is further

ORDERED: That Leonard W. Krouner shall, within 20 days of service of this order upon him, file with the Court motions to withdraw as counsel in all pending cases in which he is counsel of record, in accordance with Rule 24 of the Court's Rules, and, in addition, surrender to this Court his Certificate of Admission to practice before this Court.

By the Court:

(Signed) Joel Gerber
Chief Judge

Dated: October 22, 2004
Washington, D.C.

UNDER SEAL

UNITED STATES TAX COURT
WASHINGTON, DC 20217

In re: Leonard W. Krouner

MEMORANDUM SUR ORDER

On July 16, 2004, the Court served on Mr. Krouner an Order to Show Cause as to why he should not be suspended or disbarred from practice before this Court, the Court having received information that on April 30, 2004, Mr. Krouner was disbarred by Order of the Supreme Court of New York,

Appellate Division, Third Judicial Department, and suspended from practice pending final disposition of the disciplinary proceedings by Order of the District of the Columbia Court of Appeals. The Court also ordered Mr. Krouner to submit a written explanation of the circumstances that led to his aforementioned disbarment by New York, or any other pending disciplinary proceedings, and any material that is part of the record in such disciplinary proceedings. Thus Mr. Krouner was given notice that the underlying circumstances would be considered with respect to discipline, if any, to be imposed by this Court.

On August 20, 2004, the Court received from Mr. Krouner and filed a Motion for a Continuance, a Protective Order, and for Permission to Appear by Telephone. The portions of the motion seeking a continuance and permission to appear by telephone were denied. The portion of the motion for protective order as to certain documents submitted by Mr. Krouner was granted.

After receipt of a response from Mr. Krouner, a hearing was held on September 14, 2004, at which time Mr. Krouner appeared and presented his testimony. The hearing was held before Judges Cohen, Haines, and Goeke. Post-hearing, Mr. Kroner was permitted to submit a brief in support of his position.

Based upon information offered by Mr. Krouner, his disbarment in New York was the result of his New York criminal conviction of three felony counts based on guilty pleas on February 20, 2003. These felonies included insurance fraud, grand larceny, and workers' compensation fraudulent practices. At his hearing, Mr. Krouner admitted these felonies involved intent.

In accordance with *Selling v. Radford,* 243 U.S. 46 (1917), we conducted an examination of the record of the proceedings of the New York courts in Mr. Krouner's criminal and disbarment cases.

In *Selling v. Radford, supra,* at 51, the United States Supreme Court held that in reviewing the action of a State in disbarring a member of its bar, a Federal court:

> should recognize the condition created by the judgment of the state court, unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2. that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3. that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so.

Mr. Krouner asserts that he was denied due process in the New York disbarment that resulted from his criminal conviction because the disbarment was automatic after the criminal conviction and no hearing was provided to him. He relies upon *In Re Thies,* 662 F.2d 771 (D.C. Cir. 1980) to challenge reliance upon the automatic disbarment in New York. However, the criminal counts in this case are distinguishable from those in *Thies* because the counts in this

case all involved acts of dishonesty that raise questions of integrity and fitness to practice law.

Mr. Krouner's conviction of the three felonies was the result of a plea of guilty. He has not claimed he was denied due process in the criminal case although he alleges facts about his situation that are inconsistent with certain of the elements of the crimes of which he was convicted. The record shows Mr. Krouner was aware that one of the results of his plea would be his disbarment. Since Mr. Krouner has not established any grounds to assert a denial of due process in the criminal conviction, we find the guilty plea to these charges involving dishonest conduct in itself is grounds for discipline in our Court. The conduct admitted by his guilty plea involved dishonesty and reflected adversely on his fitness to practice law. As provided in Rules 8.4(a), (b) and (c) of the Model Rules, "It is professional misconduct for a lawyer to (a) knowingly violate or attempt to violate the Rules of Professional Conduct . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Conduct such as that admitted by Mr. Krouner is a per se violation of the Rules under which practitioners in this Court operate.

Our review of the record of the New York criminal proceedings and Mr. Krouner's allegations convinces us that Mr. Krouner received due process in the New York criminal proceedings and that none of the other factors listed in *Selling v. Radford* that would prevent this Court from giving conclusive effect to the findings of the State Court are present in this case. In addition, as stated above, his guilty plea is grounds for disbarment before this Court.

Mr Krouner also asserts that we should consider mitigating circumstances due to his illness at the time of the events that led to the criminal charges. He cites *Thread v. United States,* 354 U.S. 278 (1957) to support his assertion that his medical condition at the time of his illegal acts should mitigate the effect of those acts. We have reviewed the circumstances that Mr. Krouner asserts, and we find them unpersuasive and insufficient to mitigate the effects of his guilty plea. Accordingly, we conclude that Mr. Krouner should be disbarred from practice before this Court. As a second ground for disbarment in this Court, we find Mr. Krouner was not denied due process in the New York disbarment.

DATED: October 22, 2004
Washington, D.C.

APPENDIX F

UNITED STATES TAX COURT
WASHINGTON, DC 20217

In re: Leonard W. Krouner

ORDER TO SHOW CAUSE

This Court has received information that on April 30, 2003, you were disbarred from practice by Order of the Supreme Court of New York, Appellate Division, Third Judicial Department and you were also suspended from practice pending final disposition of the disciplinary proceedings by Order of the District of Columbia Court of Appeals dated May 18, 2004. Therefore, it is

ORDERED: That on or before August 31, 2004, you show cause, if any, in writing, why you should not be suspended or disbarred from practice before this Court or otherwise further disciplined. It is further

ORDERED: That a hearing concerning your proposed discipline is scheduled at the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217 on September 14, 2004 at 10:00 a.m., at which time you may further show cause, if any, why you should not be suspended, disbarred or otherwise disciplined. If you wish to appear at said hearing, in person, or by counsel, a notice in writing, advising the Court of your intention to appear, accompanied by an explanation of the circumstances that led to the aforementioned, or any other pending disciplinary

proceedings, and any material in your possession that is part of the record in such disciplinary proceedings, shall be submitted on or before August 31, 2004. If no such notice is submitted, your right to appear at the hearing shall be deemed waived.

You are at liberty to submit your written resignation from the bar of the United States Tax Court on or before August 31, 2004. It is further

ORDERED: That in the event you fail to submit your resignation or to show cause why you should not be suspended or disbarred or further disciplined, or in the absence of a request for hearing on or before August 31, 2004, this Committee will take such further action as it deems appropriate.

/s/
Carolyn P. Chiechi, Judge
Chair, Committee on
Admissions, Ethics, and
Discipline

Dated: July 16, 2004
Washington, D.C.

SERVED JUL 16 2004

APPENDIX G

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX I

EXCERPTS FROM STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986

AND AS AMENDED, FEBRUARY 1992

* * *

"...merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purposes of lawyer discipline, and may take into account aggravating or mitigating circumstances"

* * *

ABA Standard For Imposing Lawyer Sanctions
Joint Committee on Professional Sanctions

Chairman
Hon. James Duke Cameron
Phoenix, Arizona

Co-Chairman
Robert P. Cummins
Chicago, Illinois

Members

Kurt M. Bulmer Seattle, Washington	James P. Hargarten San Francisco, California
Charles W. Kettlewell Columbus, Ohio	Hon. Richard H. Mills Springfield, Illinois
Hon. Ben F. Overton Tallahassee, Florida	Hon. Florence R. Peskoe Freehold, New Jersey
Hon. George H. Revercomb Washington, D.C.	John Berry Tallahassee, Florida (Liason, National Organization of Bar Counsel)

Cynthia A. Kelly, *Reporter*
Loyola University School of Law
Chicago, Illinois

* * *

In 1979, the American Bar Association published the *Standards for Lawyer Discipline and Disability Proceedings*. [*The Standards for Lawyer Discipline and Disability Proceedings* have been superseded by the ABA *Model Rules for Lawyer Disciplinary* Enforcement *(MRLDE)*][1] That book [the *Standards*] was a result of work by the Joint Committee on Professional Discipline of the American Bar Association. The Joint Committee was composed of members of the Judicial Administration Division and the Standing Committee on Professional Discipline of the American Bar Association. The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community.

The 1979 standards have been most helpful, and have been used by numerous jurisdictions as a frame of reference against which to compare their own disciplinary systems. Many jurisdictions have modified their procedures to comport with these suggested standards, and the Standing Committee on Professional Discipline of the American Bar Association has assisted state disciplinary systems in evaluating their programs in light of the approved standards.

* * *

The Standards merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances" (Standard 7.1) [*See generally* Rule 10, ABA *MRLDE*]

* * *

[Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

As an example of this problem of inconsistent sanctions, consider the range in levels of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year,[2] while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured.[3] Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment,[4] suspension,[5] and censure.[6] The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions.

* * *

In addressing this task, the Sanctions Committee recognized that any proposed standards should serve as a *model* which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.

* * *

The standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time. Finally, the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

* * *

Finally, the purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies throughout the country articulate the reasons for sanctions imposed.

* * *

The effort of the Sanctions Committee was made easier by the well-reasoned judicial opinions that were available. At the

same time, the Sanctions Committee was frustrated by the fact that many jurisdictions do not publish lawyer discipline decisions, and that even published decisions are often summary in nature, failing to articulate the justification for the sanctions imposed.

[The *Standards for Imposing Lawyer Sanctions* were amended by the ABA House of Delegates on February 4, 1992. The amendments were proposed by the ABA Standing Committee on Professional Discipline as a result of its ongoing review of the courts' use of the Standards in lawyer disciplinary cases to assure their consistency with the developing case law.]

* * *

This view of the professional relationship requires lawyers to observe the ethical requirements that are set out in the Model Rules (or applicable standard in the jurisdiction where the lawyer is licensed). While the Model Rules define the ethical guidelines for lawyers, they do not provide any method for assigning sanctions for ethical violations. The Committee developed a model which requires a court imposing sanctions to answer each of the following questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and

(4) Are there any aggravating or mitigating circumstances?

* * *

The *mental states* used in this model are defined as follows. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

* * *

In each case, after making the initial determination as to the appropriate sanction, the court would then consider any relevant *aggravating or mitigating factors* (Standard 9). For example, the presence of aggravating factors, such as vulnerability of the victim or refusal to comply with an order to appear before the disciplinary agency, could increase the appropriate sanction. The presence of mitigating factors, such as absence of prior discipline or inexperience in the practice of law, could make a lesser sanction appropriate.

* * *

The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts

the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

* * *

DEFINITIONS

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

* * *

1.1 ***Purpose of Lawyer Discipline Proceedings.*** **The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.**

* * *

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 *GENERALLY*

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

* * *

9.0 *Aggravation and Mitigation*

9.1 ***Generally***

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 ***Aggravation***

9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 Factors which may be considered in aggravation.

Aggravating factors include:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) illegal conduct, including that involving the use of controlled substances.

9.3 ***Mitigation***

9.3 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation.

Mitigating factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when:

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in disciplinary proceedings;

(k) interim rehabilitation;

(l) imposition of other penalties or sanctions;

(m) remorse;

(n) remoteness of prior offenses.